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In the Supreme Court of the United States

OCTOBER TERM, 1944

No. 629

COMMISSIONER OF INTERNAL REVENUE, PETITIONER

v.

WILLIAM H. WEMYSS

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT

The Solicitor General, on behalf of the Commissioner of Internal Revenue, prays that a writ of certiorari issue to review the judgment of the United States Circuit Court of Appeals for the Sixth Circuit, entered on July 24, 1944, reversing the decision of the Tax Court of the United States.

OPINIONS BELOW

The opinions of the Tax Court (R. 11–24) are reported in 2 T. C. 876. The opinion of the Circuit Court of Appeals (R. 71–77) is reported in 144 F. 2d. 78.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered on July 24, 1944. (R. 71.)

The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTIONS PRESENTED

1. May a financial detriment sustained by a transferee from which, however, taxpayer receives nothing of money value to replace the depletion of his estate resulting from the transfer, constitute "consideration" within the meaning of Section 503 of the Revenue Act of 1932?

2. Assuming an affirmative answer to the previous question, is not, in any event, the excess in value of the property which taxpayer transferred above the loss in money value which the transferee sustained, taxable within the meaning of Section 503 of the Revenue Act of 1932?

3. Did the transfer from taxpayer to his prospective wife constitute a gift within the meaning of Sections 501 and 503 of the Revenue Act of 1932?

4. Did the Circuit Court of Appeals, in ruling that taxpayer lacked donative intent, assume the function of the Tax Court by making a finding of fact either contrary to or not found by the Tax Court?

STATUTES AND REGULATIONS INVOLVED

Revenue Act of 1932, c. 209, 47 Stat. 169:

SEC. 501. IMPOSITION OF TAX.

(a) For the calendar year 1932 and each calendar year thereafter a tax, computed as

provided in section 502, shall be imposed upon the transfer during such calendar year by any individual, resident or nonresident, of property by gift.

* * * * *

SEC. 503. TRANSFER FOR LESS THAN ADEQUATE AND FULL CONSIDERATION.

Where property is transferred for less than an adequate and full consideration in money or money's worth, then the amount by which the value of the property exceeded the value of the consideration shall, for the purpose of the tax imposed by this title, be deemed a gift, and shall be included in computing the amount of gifts made during the calendar year.

Treasury Regulations 79 (1936 ed.):

ARTICLE 1. *Imposition of tax.*— * * * The tax is not limited in its imposition to transfers of property without a valuable consideration, which at common law are treated as gifts, but extends to sales and exchanges for less than an adequate and full consideration in money or money's worth. (See article 8.) The statute taxes all such transfers of property made during the calendar year 1932 (after June 6, 1932, the date of the enactment of the Revenue Act of 1932) and each calendar year thereafter (other than gifts specified in subsection (b) of section 504) to the extent that they are donative in character * * *.

ARTICLE 8. *Transfers for a consideration in money or money's worth.*—Trans-

fers reached by the statute are not confined to those only which, being without a valuable consideration, accord with the common law concept of gifts, but embrace as well sales, exchanges, and other dispositions of property for a consideration in money or money's worth to the extent that the value of the property transferred by the donor exceeds the value of the consideration given therefor. However, a sale, exchange, or other transfer of property made in the ordinary course of business (a transaction which is bona fide, at arm's length, and free from any donative intent), will be considered as made for an adequate and full consideration in money or money's worth. A consideration not reducible to a money value, as love and affection, promise of marriage, etc., is to be wholly disregarded, and the entire value of the property transferred constitutes the amount of the gift.

Treasury Regulations 103, promulgated under the Internal Revenue Code:

> SEC. 19.22 (b) (3)–1. *Gifts and bequests.*— * * * An amount of principal paid under a marriage settlement is a gift. * * *

STATEMENT

Some time prior to May 24, 1939, taxpayer, a widower, proposed marriage to Ellen Stokes More, a widow. She was the recipient of the income for life under trusts created by her first

husband for the benefit of herself and infant son by her first marriage. (R. 12–13.) However, in the event of remarriage she lost her income in these trusts, which would then inure entirely for the benefit of her son. (R. 13, 21.) Mrs. More told taxpayer she would not be willing to marry him and lose her life income under these trusts created by her first husband unless he would enter into an antenuptial contract with her to make good the loss, and on May 24, 1939, they entered into such an agreement in writing. (R. 13.) This writing recited that Mrs. More "has promised to marry" taxpayer on June 20, 1939; that upon consummation of the marriage she "will be deprived of a large monthly income"; and that it was the desire of taxpayer "to compensate said Ellen Stokes More for her aforesaid loss and to provide for and maintain her so long as she may live in keeping with her station in life"; and that for these reasons taxpayer had that day transferred 13,139 shares of the common stock of the General Shoe Corporation to her. (R. 14.) This contract was prepared by Mrs. More's father, who was an attorney. (R. 30.) On the same day taxpayer transferred the shares to Mrs. More and approximately a month later the marriage took place. (R. 15.) On the wedding day and immediately following the marriage, taxpayer executed a will providing an estate for life or widowhood for his wife in a certain farm and

a trust for her benefit of one-third of his estate, less the value of 11,139 shares of common stock of General Shoe Corporation. (R. 15.) The income which she had been receiving under the trust created by her first husband ceased for her own use and was thereafter paid for the benefit of her infant son. (R. 15, 21.)

The Commissioner determined that the transfer of the 13,139 shares was not made for a consideration in money or money's worth and that the transfer constituted a gift of an amount equal to the value of the stock, which he found to be $149,456.13. (R. 15.) In addition to contending that there was no gift within the meaning of the statute, taxpayer urged that the value of the annuity which Mrs. More surrendered was $77,500 and therefore that the gift could not exceed the difference between that amount and the value of the stock, or $71,956.13. (R. 17.)

The Tax Court found that the only consideration received by taxpayer for the transfer of the stock was the promise of marriage and that pursuant to Article 8 of Treasury Regulations 79 it must be disregarded. (R. 18.) The Tax Court held that even if it be assumed that the loss by Mrs. More of the income of the trusts was a consideration for the transfer of the stock rather than a mere consequence of the marriage, taxpayer's contention must fail because (a) he did not receive the income of the trusts nor acquire any

right to them, and (b) the actual value of Mrs. More's interest under the trusts was not proved. (R. 21.) The Tax Court also noted that the interest in the trust estate surrendered by Mrs. More upon her marriage to taxpayer inured entirely to the benefit of her infant son. (R. 21–22.) Accordingly, the Tax Court sustained the determination of deficiencies. Upon review by the entire Tax Court, Judge Disney alone dissented, solely because of the "financial detriment suffered by the wife-to-be, as a consideration which in my opinion the law requires us to take into account" (R. 24), stating, however (R. 23):

> Of course, the fact that it may not have represented full and adequate consideration goes only to the amount to be deemed gift.

The court below reversed the decision of the Tax Court and held that no tax whatsoever was due (R. 71–77).

SPECIFICATION OF ERRORS TO BE URGED

The Circuit Court of Appeals erred:

1. In holding that the financial detriment sustained by the transferee, from which the estate of taxpayer derived no financial benefit, constituted consideration within the meaning of Section 503 of the Revenue Act of 1932.

2. In holding that the excess in money value between property which taxpayer conveyed to his prospective wife and the detriment which she sus-

tained upon becoming his wife, need not be calculated, under Section 503 of the Revenue Act of 1932.

3. In holding that the excess in money value between property which taxpayer conveyed to his prospective wife and the detriment which she sustained upon becoming his wife, is not taxable under Section 503 of the Revenue Act of 1932.

4. In holding immaterial the ruling of the Tax Court that taxpayer had failed to prove the actual money value of his prospective wife's interest in the trust income which she surrendered upon her marriage.

5. In holding that the transfer by taxpayer to his wife was not a gift within the meaning of Sections 501 and 503 of the Revenue Act of 1932.

6. In assuming jurisdiction itself to make a finding of fact of lack of donative intent on the part of taxpayer, which the Tax Court either had not made below or had found to the contrary.

7. In reversing the decision of the Tax Court.

REASONS FOR GRANTING THE WRIT

The questions presented are of importance in the administration of the tax laws; there is conflict with respect to them between different Circuit Courts of Appeals; similar cases involving the present issues are likely to be decided differently in the future by the several Circuit Courts of Appeals; and the decision of the court below is believed to be erroneous. Moreover, the case of

Merrill v. *Fahs*, No. 126, this term, in which the Court granted a petition for certiorari on October 9, 1944, raises analogous questions, and a decision in this case will serve further to advance the settlement of the law relating to gift taxation of transfers pursuant to antenuptial agreements and possess large usefulness from an administrative standpoint.

(a) The Tax Court held, one judge dissenting on this point, that the only consideration received by taxpayer for the transfer of stock to his prospective wife was the promise of marriage; that under the pertinent regulations,[1] which here were deemed to have received Congressional approval and the force of law, this is wholly to be disregarded. (R. 18.) The Tax Court further held (R. 21):

> Even if it be assumed that the loss by his wife of the income of the trusts was a consideration for the transfer of the stock rather than a mere consequence of the marriage, petitioner's contention must fail because he did not receive the income of the trusts or acquire any right thereto. All that he received was a promise of marriage which, as heretofore pointed out, is not measurable in money or money's worth.

The court below, on the contrary, held (R. 75):

> We do not read section 503 of the revenue act as requiring its application to a case

[1] Regulations 79, Article 8, *supra*, pp. 3–4.

> where a detriment, measurable in money or money's worth, suffered by the transferee does not inure to the benefit of the transferor in money or money's worth.
>
> * * * * *
>
> But we do not regard Article 8 of Regulation 79 as applicable to the facts of this case. The transfer of the property involved herein was not for a consideration of a mere promise of marriage; the consideration for the transfer was not only a promise to marry but a concomitant surrender by the transferee of a life income in an existing trust fund.

This ruling of the Sixth Circuit Court of Appeals, namely, that detriment to the transferee may constitute consideration under Section 503,[2] is in conflict with the holding of the Circuit Court of Appeals for the First Circuit in *Commissioner* v. *Bristol*, 121 F. 2d 129, 133–134, that the purpose of this section is to prevent depletion of the estate of the donor and to require that property involved in a transfer be replaced by property of equal value, so that the transferor's estate will not be reduced without a tax being paid. Thus, in the *Bristol* case, the court said (p. 133):

> "Consideration", as used in Section 503, is not the same as common law consideration; it means that when the transferor gives something away and does not at the same time replace it with money of equal

[2] Revenue Act of 1932, *supra*, pp. 2–3.

> value or some goods or services capable of being evaluated in money, he is deemed to have made a gift within the taxing law.

Again, in *Commissioner* v. *Greene*, 119 F. 2d 383, 385–386, certiorari denied, 314 U. S. 641, the Circuit Court of Appeals for the Ninth Circuit held that the meaning of consideration as used in the statute and regulations[4] is not controlled by local law but, on the contrary, the taxing act treats certain transfers as gifts whether local law deemed them so or not.

(b) On taxpayer's own claim, the value of the property transferred to the prospective wife was almost twice the value of the life interest in the trusts which she surrendered consequent to her marriage. The undisputed value of the stock which taxpayer transferred was $149,456 (R. 15); the present value of the life income which the transferee surrendered was, taxpayer asserted, $77,500 (R. 17). The court below held that the law does not require that the difference in these values be calculated and the excess taxed under Section 503; that what she surrendered was a sufficiently real consideration to negative a gift-motive concept in the excess in value of the property transferred. (R. 76.) In this connection, the court below directly stated that it is "not in accord with the opinion expressed by the majority of the Court of Appeals for the Ninth

[4] Sec. 503, Revenue Act of 1932, and Articles 1 and 8 of Regulations 79, *supra*, pp. 3–4.

Circuit" in *Commissioner* v. *Greene*, 119 F. 2d 383, 386, *supra*, certiorari denied, 314 U. S. 641 and that it found the reasoning of the Circuit Court of Appeals for the Seventh Circuit in *Lasker* v. *Commissioner*, 138 F. 2d 989, "more congenial". (R. 76.) Hence, the court below apparently considered it unnecessary expressly to rule on the holding of the Tax Court that taxpayer had failed in any event to prove the actual value of his wife's interest in the trusts created by her first husband. (R. 21.)

(c) Finally, the court below stated (R. 75, 76):

> The tax court itself found no evidence of an actual donative intent upon the part of petitioner in transferring the stock.
>
> * * * * *
>
> Manifestly, there was no donative intent in the transfer sought to be taxed as a gift and the transfer itself was not a donative action, within the meaning of section 503 of the Revenue Act or any other sections of the Gift Tax Statute.

However, careful examination of the findings and opinion of the Tax Court fails to reveal any finding by the Tax Court that there was "no evidence of an actual donative intent". It is true that the Tax Court nowhere made a distinct finding that there was donative intent. However, certainly it did not find that there was none. On the contrary, implicit throughout the Tax Court's decision, is the fact finding that this was no busi-

ness or arm's length transaction, but rather a family settlement, and that there was donative intent. Thus, the Tax Court notes the lack of monetary value of marriage (R. 18); the discrepancy, amounting to almost $72,000, between the value of the stock transferred by taxpayer and the detriment claimed to have been suffered by the transferee (R. 17); the purpose of the gift tax to prevent evasion of the estate tax by means of premarital gifts, and the gift taxation of the transfer by a wealthy man of a substantial portion of his property to his intended spouse as a reasonable exercise of the power to prevent such evasion (R. 20); the provisions of the taxpayer's will executed on the wedding day (R. 15); and the possibility that maternal instinct prompted Mrs. More to make the agreement which would give her son double assurance of an adequate income for life (R. 21–22). It seems clear that the Tax Court looked upon the transaction as a family arrangement, not a business deal. Certainly, the record contains ample evidence to sustain such a finding, and if made, it is entitled to finality. *Dobson* v. *Commissioner*, 320 U. S. 489, rehearing denied, 321 U. S. 231. Nevertheless, the court below found that the prospective wife bargained at "arm's length" (R. 74), that the transaction was "business-like" in nature (R. 75), that the transfer was completely dissociated from any *indicia* of an intent to avoid

death taxes and that the minds of the contracting parties were not upon the effect of the transfer in the event of the death of either. (R. 76.) Even if the Tax Court may be deemed not to have made a fact finding of the intent of the parties, as donative or otherwise, still it seems clearly to have been error for the court below itself to have made such a finding. If the Circuit Court of Appeals believed that a finding on the subject of donative intent was requisite for decision of the case, it should not have attempted to weigh the evidence itself and make the finding, but should have remanded the case to the trier of the facts. *Helvering* v. *Rankin*, 295 U. S. 123; *Levitt & Sons* v. *Nunan*, 142 F. 2d 795, 798 (C. C. A. 2d).

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted.

CHARLES FAHY,
Solicitor General.

OCTOBER 1944.

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